SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1015

WILLIAM H. EISENLORD, as Administrator of the Estate of Maude F. Addis, Deceased,

Petitioner,

against

MAY ELLIS, MYRTLE CONLON and LILLIE SCHUFELDT,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Review by Certiorari of the unanimous decision of the Circuit Court of Appeals, Second Circuit, affirming the District Court, is sought by petitioner herein, in an action involving interpretation of a contract exercising options contained in insurance policies aggregating only $5,000. Peculiar, unusual and novel traits have been ascribed by petitioner to this simple contract, which easily finds it way to legality through the path of numerous, firmly established legal doctrines, abundantly sustained by authorities. Condemnation of insurance in all its beneficial phases is advocated in urging the Court to grant the writ herein.

Respondents claim that the fallacy of petitioner's position lies not in the rules cited, but in the application of these rules.

Statement of the Matter Involved

Petitioner's brief substantially sets forth the material facts except that the provision in all of the insurance policies out of which this action originated, has been omitted. This provision is as follows:

> "At the maturity of this policy, the Company, unless otherwise directed, will extend the above options to the beneficiaries."

Only by reason of conflicting claims to the same fund in the hands of an insurance company by citizens of different states, did a federal Court acquire jurisdiction of this cause through an action in interpleader by the insurance company.

Jurisdiction

The jurisdiction of the Court and the opinions of the Courts below are referred to in petitioner's brief, although the necessity for intervention by the Supreme Court is obscure.

Reasons for Denying the Writ

1. There is no unusual, significant or important reason for granting Certiorari.

Petitioner vaguely discusses publicity, creditor's claims, rights of inheritance, and even the much mooted insurance tax question, in an effort to obtain Certiorari in this case. None of these factors even remotely appear in the record, and delay at every opportunity, as an examination of the record will indicate (Rec. Fol. 186-252), is apparently the chief motive for requesting Certiorari. Petitioner is the

Administrator, but is entitled to no part of the Estate of Maude Addie, and in addition to the funds in this action, respondents are claiming a substantial part of the Estate of Maude Addie in Colorado, by virtue of a separate trust instrument.

No Estate, gift or income tax avoidance device is involved.

Internal Revenue Code, Sec. 811 (c).

Internal Revenue Code, Sec. 22 (b).

Treas Dept. Reg. 103, Sec. 19.22 (b) (1)-1.

Burnet v. *Wells*, 289 U. S. 670.

Helvering v. *Hallock*, 309 U. S. 106.

See *Bailey* v. *U. S.*, 31 Fed. Supp. 778,

which applies the rule in the above cases to life insurance.

An examination of these citations will indicate the taxability of the funds in the transaction at bar, although that question is not presented in this action.

Novelty is ascribed to the contract in an endeavor to sway the Court's discretion to grant the Writ. A provision similar to that hereinabove quoted, was interpreted as mandatory on an insurance company.

Latterman v. *Guardian Life Ins. Co.*, 280 N. Y. 102; 19 N. E. (2d) 978.

A contract similar in *every* legal aspect to that at bar was sustained in

Warren, Executrix v. *United States*, 68 Ct. Cl. 634; Certiorari Denied, 281 U. S. 739,

wherein the Court upheld a contract for the benefit of a third party.

2. There is no important question of local law involved herein, to be resolved by this Court.

A.

Consistent refusal by petitioner to regard the transaction at bar as a contract has led him to cite to the Court numerous cases applying the rule on validity of testamentary dispositions.

Interpretation of written instruments and classification thereof into their proper legal category, is the only question involved herein, and state courts are competent to pass upon this question.

The Court below was well qualified to perform this task, and is amply sustained by authorities.

With the possible exception of *McCarthy* v. *Pierret*, 281 N. Y. 407, the cases cited by petitioner are distinguishable on the facts most of them interpreting either an agency or a unilateral arrangement. The weight to be accorded the McCarthy decision has been considerably lessened by the criticism it has received, and the Court below expressly declined to follow the rule laid down therein, but preferred, in this matter wherein insurance proceeds were involved, to rely on the decision of

In re Koss's Estate, 106 N. J. Eq.

See 53 Harv. Law Rev. 1060; 51 Yale Law Rev. 30.

It is also noteworthy that in the McCarthy decision, Judges Lehman and Loughran, two of the country's most eminent and learned jurists, dissented.

Which horn of the dilemma the Court of Appeals of New York would take in the case at bar—one involving insurance proceeds—in choosing between the Latterman case

(supra) mandatorily requiring the insurance company to permit the exercise of an option, and the McCarthy case, with *Seaver* v. *Ransom* (224 N. Y. 233), in mind would be interesting to watch. Undoubtedly the Court of Appeals would arrive at the same conclusion as the Circuit Court.

3. There is no conflict with the decision in *Basket* v. *Hassell*, 107 U. S. 602.

The Circuit Court apparently either distinguished on its facts, the case of *Basket* v. *Hassell*, cited to it by petitioner, or discarded the rule therein for the more recent, liberal rule of the American Law Institute, Restatement of Contracts (Sections 133, 135).

The distinction in the case of *Basket* v. *Hassell* is obvious, there being no promise therein on the part of the bank to pay the proceeds represented by the certificate to the third party beneficiary. (American Law Institute, Restatement of Contracts, Sections 133, 135.)

This promise, respondents claim, is the fact that distinguishes the present case from those cited by petitioner, and is the *controlling factor* in making the transaction at bar a contract. That there was consideration for this promise is undisputed.

Restatement of Contracts, Sec. 133, Comment (a).

Id. Sec. 135, Comment (a).

Id. Sec. 79, Illustration (1).

Under such a contract the third party beneficiary takes a vested right subject to the reserved power to change or revoke.

Restatement of Contracts, Sec. 142.

In Colorado, this right is always vested and enforcible by the beneficiary.

Hill v. *Capitol Life Ins. Co.*, 91 Colo. 300.

Grimes v. *Barndollar*, 58 Colo. 421.

4. There is no conflict with the decision of any other Circuit Court of Appeals on the *same* matter.

As has been heretofore pointed out, the Circuit Court of Appeals for the Second Circuit in the action at bar, determined that this was a valid contract for the benefit of a third party, and based its decision upon the Restatement of Contracts, which requires assent by a promisor to accede to the request of the promisee to pay the third party beneficiaries. No such fact exists in any of the decisions in other Circuits cited by petitioner.

The Stevens case apparently turned on the question of notice and constitutionality of a Statute failing to provide for such notice. The other cases cited are similarly distinguishable on the facts.

5. No reason exists for the exercise of the power of supervision of the Supreme Court of the United States.

The United States Circuit Court of Appeals for the Second Circuit has followed the usual and expected procedure in its decision in this action.

Approximately one and one-half billion dollars is now held by the various insurance companies doing business in the State of New York under similar supplemental contracts.

New York Insurance Reports, 1940.

Statistical Tables, p. 31.

Certiorari has already been denied by this Court in the only similar case that research has disclosed, probably on the ground that this presented a matter involving only state policy which should be determined by the Courts of the respective states.

Warren, Executrix v. *United States*, 68 Ct. Cl. 634; Certiorari denied, 281 U. S. 739.

Based upon the above decision, untold thousands of Defense Bonds have been issued, naming beneficiaries to take upon the death of the purchaser.

Picture the furore and consider the effect of a reversal of the present decision on such contracts already executed by the Treasury Department in the sale of Defense Bonds on which purchasers have named beneficiaries under the rules established by the Treasury Department. Statutory sanction for the promulgation of such rules is lacking, except that authorization is given for the issuance and transfer of such bonds in such manner and on such terms as the Secretary of the Treasury may prescribe.

See *Liberty Bond Act*, Sec. 6 as amended; U. S. Code Title 31, Sec. 757c, Subsec. (a), as amended.

See *Treasury Department Circular No.* 530 (1936), December 16, 1936, Sec. I, 2(a) (3); Idem, Circular No. 571 (1936), December 16, 1936, Sec. 8.

See also Treasury Department Circular No. 530 (4th Rev., April 15, 1941), Sec. 315.2 (e), and Sec. 315.12.

The Colorado Supreme Court expressly declined to sustain the position sought by petitioner in such a case.

In re Stanley's Estate, 102 Colo. 422; 80 P. 2d 332 (1938).

No reason for Certiorari to the Circuit Court of Appeals for the Second Circuit exists in this case, due to the fact that the Courts of the respective states are sufficiently competent to determine and interpret contracts involving property within, or executed pursuant to, the laws of the respective states.

Conclusion

The petition should be denied.

Respectfully submitted,

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